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No. 07-303

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IN THE

Supreme Court of the United States

MICHAEL TAYLOR,
Petitioner,

v.

LARRY CRAWFORD and JAMES D. PURKETT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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October 9, 2007

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INTRODUCTION

In granting the petition for a writ of certiorari in *Baze v. Rees*, No. 07-5439, this Court recognized that the legal issues surrounding execution by lethal injection are important and deserving of the Court's attention. In its response to Taylor's petition, which, like *Baze*, addresses the proper Eighth Amendment standard for adjudicating lethal-injection challenges, the State of Missouri has all but conceded that the petition, at minimum, must be held for *Baze*, and has asked that this Court instead consolidate the cases and hear argument in *Taylor*. Br. in Opp. at 14, 17-18. Taylor's petition thus presents the rare capital case in which both the condemned prisoner and the State have asked this Court for plenary review.

As the State recognizes, Taylor's case would be of substantial assistance to the Court in adjudicating the important issues raised in *Baze*, as well as additional related and important issues not implicated by *Baze*. *Taylor* offers the Court a rich factual record, *see* Br. in Opp. at 15, that demonstrates with clarity how lethal injection is actually administered. Moreover, the petition provides the Court the opportunity to address directly a growing circuit split over whether method of execution challenges must demonstrate deliberate indifference, an important legal question that *Baze* "will not resolve." Br. in Opp. at 16.

Because the parties agree that the petition should be granted, and because consolidation would materially aid this Court in considering the full panoply of issues presented by lethal injection, Taylor respectfully asks that this Court grant

his petition and consolidate it with *Baze*, or schedule it for argument later this Term.[1]

ARGUMENT IN REPLY

This Court should grant Taylor's petition and provide plenary review for the following reasons.

First, the State has effectively conceded that this Court should grant Taylor's petition for certiorari. Although the State's preferred disposition is that this Court deny Taylor's petition, the State admits that it is "likely" that Taylor's petition would at least be held for *Baze* and remanded for further proceedings. Br. in Opp. at 14. Taylor submits that he is, at minimum, entitled to have his petition held pending adjudication of *Baze*, as the cases raise closely related legal questions.[2] But more importantly, the State's recognition that a hold is likely "leads Respondents to do something that they normally would not do: to suggest that ... the Court ... grant Taylor's petition." Br. in Opp. at 18. As both parties have asked this Court for guidance -- a highly unusual

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[1] On September 25, 2007, the same day this Court announced that it had granted the petition in *Baze*, Taylor filed a Motion For Expedited Consideration Of Petition For Certiorari and Consolidation asking that the cases be heard together. That motion was calendared for the October 5, 2007 Conference. In compliance with Taylor's statement in that motion, counsel has filed this reply brief within 48 hours of the filing of the State's Brief in Opposition to allow for timely consideration of the petition. If necessary, Taylor is prepared to meet the briefing schedule for the *Baze* case should the Court now grant the petition and seek to consolidate the cases at this time. The State has also indicated that it could comply with the *Baze* briefing schedule. Br. in Opp. at 18.

[2] Notably, the Court has recently stayed at least one execution on the strength of a certiorari petition raising issues implicated in *Baze*. *See Turner v. Texas*, 07A272 (Sept. 27, 2007).

occurrence, particularly in capital cases -- there is an especially great need for the Court to hear the case.

Second, as the State's Brief in Opposition recognizes, *Taylor* offers this Court a natural complement to the legal issues and factual scenarios raised in *Baze*. The "well-developed" record in *Taylor*, Br. in Opp. at 15, provides this Court with highly pertinent evidence (including testimony from the executioners themselves) about how lethal injection is carried out. The record in *Baze*, in contrast, sheds less light on this point because Kentucky, unlike Missouri, has not recently carried out an execution.

The two cases also present overlapping but distinct legal issues, such that a ruling in *Baze* will not completely resolve the issues in *Taylor*. *See* Br. in Opp. at 16. While both cases implicate the proper legal standard for adjudicating method of execution claims, only *Taylor* presents the question (now the subject of a 2-1 circuit split as well as numerous recent diverging district court decisions) of whether plaintiffs must make out a showing of deliberate indifference. *See, e.g.*, *Nooner v. Norris*, No. 05:06CV00110, 2007 WL 2710094, at *8 (E.D. Ark. Sept. 11, 2007) (stating that under the Eighth Circuit's ruling in *Taylor*, "[i]f Nooner is challenging conduct alleged to be a deviation from the official lethal injection protocol, he must show deliberate indifference," and finding that Nooner was unlikely to establish deliberate indifference); *Cooey v. Taft*, No. 2:04-CV-1156, 2007 WL 2607583, at *4 (S.D. Ohio Sept. 25, 2007) (stating standard as requiring "unacceptable and unnecessary risk" of inflicting pain, without mental state). Taylor's case also presents challenges to the State's qualification requirements for the execution team members, an issue that *Baze* does not address. Br. in Opp. at 16-17. And Taylor's case, unlike *Baze*, also comes to this Court through a Section 1983 action brought in federal court, and raises, in its second Question

Presented, the issue of the scope of the court's remedial discretion once an Eighth Amendment violation has been proven. *See also, e.g., Morales v. Hickman*, 415 F. Supp. 1037, 1047 (N.D. Cal. 2006) (crafting remedial injunction). It thus offers the Court a chance to state, in addition to the legal standard, what federal law requires in terms of obtaining and shaping an injunction for a violation of the Eighth Amendment. In sum, while the two cases overlap, *Taylor* raises additional issues with which numerous courts and litigants have grappled, and that are likely to recur with frequency.

Third, the concept of consolidating cases is well-established in this Court, which routinely grants certiorari in pairs of cases that raise important questions, so as to have the widest possible lens to use for adjudication. *See, e.g., Parents Involved in Community Schools v. Seattle School Dist.* and *Meredith v. Jefferson Cty. Bd. of Educ.*, 127 S.Ct. 2738 (2007); and *Granholm v. Heald & Mich. Beer* and *Wine Wholesalers Assoc v. Heald & Swedenburg v. Kelly*, 544 U.S. 460 (2004); and *IBP, Inc. v. Alvarez* and *Tum v. Barber Foods, Inc.*, 546 U.S. 21 (2005). The benefits of a two-fold record are plain: they place a larger range of legal issues before the Court and they provide the Court with a more complete factual backdrop to decide those issues. *See IBP, Inc.*, 546 U.S. at 24 (noting that Court granted certiorari in both cases to resolve a question presented in both cases, as well as a related question presented only in *Tum*). In short, considering *Taylor* in conjunction with *Baze* will allow the Court to provide more complete guidance than would consideration of *Baze* alone.

Fourth, and relatedly, the State's Brief in Opposition is devoid of any reason why certiorari should not be granted. Both parties agree that there is no impediment to this Court's

jurisdiction nor any other vehicle problem that would counsel against granting the petition.

Finally, if this Court were to grant the petition, the parties stand ready to complete the briefing in time to consolidate the argument with *Baze*. *See supra* note 1. If the Court were inclined to allow additional time for briefing, another possibility would be to hear argument in *Taylor* during the February sitting, with opinions in both cases to follow. Taylor is prepared to comply with either course, or any other that the Court deems fit.

CONCLUSION

For the foregoing reasons, the petition should be granted, and consolidated with *Baze* or scheduled for argument at a later date.

Respectfully submitted,

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